NO. 19963

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---

700 OCEAN AVENUE CORPORATION,
California corporation, et al,

Appellant,

vs.

BR ASSOCIATES, a foreign corporation,

Appellee.

Transcript
Vol. 3348

On Appeal from the United States District Court for the

Southern District of California, Central Division

PETITION FOR REHEARING

VOLNEY F. MORIN
ROBERT B. LISKER
HARLEAN M. CARROLL
1341 N. Cahuenga Boulevard
Los Angeles, California 90028

RUSSELL, BEBOUT & SWANGER
2412 Wilshire Boulevard
Santa Monica, California
Attorneys for Appellee

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 19963

1700 OCEAN AVENUE CORPORATION, a California corporation,

Appellant,

vs.

GBR ASSOCIATES, a foreign corporation,

Appellee.

PETITION FOR REHEARING

To the Honorable Richard H. Chambers, Chief Judge, Stanley N. Barnes, Circuit Judge, and Ben G. Duniway, Circuit Judge:

Appellant, 1700 Ocean Avenue, hereby petitions for a rehearing to reconsider the judgment entered December 29, 1965, on the following grounds:

1. Appellee's brief quotes, in part and out of context, a significant paragraph of the purchase agreement of June 20, 1959. From this, the impression given is that Mugleston was acting on behalf of appellant in promising to build additional units. But, when read in full (R. 92), it is clear the obligation was that of Mugleston alone. In its opinion this court concedes Mugleston agreed to build the additional units, but goes on to say it is clear that GBR Associates were not volunteers. This is true as to Mugleston, but not as to appellant.

This court states it knows of no reason why appellant should not pay reasonable value of appellee's services, and, parenthetically, that Mugle-

ston, who made the architectural services contract, had lost control of appellant corporation. This parenthetical expression sets a dangerous precedent. No case goes as far as this court in saying that if one requests another to render services, and thus takes on a personal obligation to pay for those services, which may have some incidental value to a third party, then the third party will be required to pay for the services if the first party cannot pay his own obligations. Further, Mugleston could not have requested appellee's services and bound the appellant corporation, since a Receiver had full charge of the conduct of the appellant's business.

2. The full order of the Bankruptcy Court appointing the Receiver (Record Exhibit 2) was clearly that the receiver, and he alone, was authorized to conduct the business of the appellant. Under bankruptcy law, once a receiver has been appointed, there cannot be a debtor in possession which the officers of the debtor corporation would have been if no receiver had been appointed. Bankruptcy Act, Sec. 342. Here, it is admitted the bankruptcy court acting within its powers appointed a receiver, not a debtor in possession. The result must be that, the receiver having and exercising all powers of the corporation and being duly appointed by the court having jurisdiction, the acts of any others, including the officers of the debtor corporation, while the receiver is in power, must be of no effect.

3. In its opinion this court states it is conceded that Mugleston "was everywhere helping the receiver run the corporation". This is not conceded. Not only did Mugleston not help the Receiver, he never helped to run the corporation - having expressly contracted with a Management firm of Cirod, Inc. to run the corporation - which it did until the receiver was appointed. This Court's attention is specifically called to Proposed Modi-

fied Arrangement and Petition for Leave to File the Same (Record Exhibit 4, page 5, lines 14-16): "Debtor has reaffirmed its employment of Cirod, Inc. to operate and manage the Surfrider Inn, and Cirod, Inc. has reaffirmed its acceptance of such employment." Clearly, Cirod, and not Mugleston, managed the corporation.

4. Order of Confirmation of Modified Arrangement (Record Exhibit 5) states all debts incurred after filing of the bankruptcy petition and prior to confirmation of the arrangement, were to be paid by the receiver; thereafter all creditors, such as this appellee, were restrained from proceeding. This court has said: "The officers and directors had not been enjoined from doing such things." We think they were. However, clearly, the creditors were enjoined and restrained from coming at appellant. In the reasonable course of American business, the plain language of Court Orders is that upon which businessmen make investment and conduct their affairs. It is unfair to permit these foreigners to contract with one another in a foreign country, while an American corporation's affairs are in the hands of its receiver and, thereafter, to permit these foreigners to take money from Americans.

5. There are interlocking non-sequiturs in this case:

(a) This court says the appellant knew quantum meruit lurked, since one of the legal questions listed in the pretrial order was: '(H) Whether plaintiff is entitled to the reasonable value of its services in the event said agreement is held to have no legal effect.' True, quantum meruit lurked, but only in the event said agreement is held to have no legal effect. In the entire transcript and all of the exhibits there is no finding by the trial court that the agreement was held to have no legal effect. On

page 2 at line 14 of its findings (R. 102) it says: "On October 31, 1960, Mugleston, on behalf of defendant corporation, executed a written agreement with plaintiff whereby certain architectural services were to be rendered to defendant corporation by plaintiff to be used in construction of a 45-unit addition to defendant's Surf Rider Inn Motel." Having thus found there was an agreement (not that the agreement was held to have no legal effect), the trial court, contrary to its own pretrial order, went on to grant a remedy based upon quantum meruit for reasonable value of services not a remedy called for by the contract.

(b) The trial court's finding of fact is in direct conflict with its conclusions of law and judgment. If the finding of fact is, as is shown in this record, an express written contract (R. 102), then the conclusions of law and judgment must be made upon and find support in the written agreement and not, as in this case, upon an implied in law contract. (R. 104-105).

(c) This court has stated, on page 2 of its opinion: "The trial court must have held there were fatal infirmities in the execution of the written contract, . . ." The trial court did not so hold. The record is before this Court, and this statement is not supported in that record. Furthermore, assuming this Court's interpretation of the trial court's finding of fact is correct, then there is a fatal defect in the trial court's conclusions of law and judgment. This is so because the implied in law contract is based upon the written contract; and if the written contract is defective, so must the implied in law contract be fatally defective.

6. A transcript of evidence is necessary where it is contended there is no substantial evidence to support the judgment; not to correct inconsistencies in the findings of fact and conclusions of law, as well as

errors in law. Appellant seeks not re-weighing evidentiary matter, it seeks correction of law and findings.

For all of the foregoing reasons, appellant respectfully requests this Court to grant a rehearing in order that its counsel may clearly show why this case should be remanded to the trial court for a judgment that, if the agreement in question was valid, it should be carried out - even as to arbitration. Or, if the agreement is of no legal effect, and it alone is the basis for finding appellee not to be a volunteer, then quantum meruit must also fail. Or, if the agreement in question is of no legal effect, then there must be a finding of some other request by appellant of appellee to support quantum meruit.

Undersigned counsel certifies that this petition is not interposed for delay, and that in his judgment, it is well-founded.

Dated: January 19, 1966.

Volney F. Morin
Robert B. Lisker
Harlean M. Carroll
Attorneys for Appellant, 1700 Ocean Avenue, a California corporation

By Volney F. Morin

1341 N. Cahuenga Boulevard
Los Angeles, California 90028
464-7447

*Emphasis ours throughout.

State of California)
)ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years, and not a party to the within action or proceeding; that my business address is 1341 North Cahuenga Boulevard, Los Angeles, California 90028; that on January 19th, 1966 I served three copies of PETITION FOR REHEARING on the appellee in said action or proceeding by depositing three true copies thereof enclosed in a sealed envelope with postage thereon fully paid, in a mailbox regularly maintained by the Government of the United States at Cahuenga Boulevard and Homewood Avenue, in the city of Los Angeles, California, addressed to the attorneys of record for said appellee at the office address of said attorneys, as follows:

Russell, Bebout & Swanger

2412 Wilshire Boulevard

Santa Monica, California

Sarah Scott

Subscribed and sworn to before me

this 19th day of January, 1966.

Dorothy J. Badivian

D

OFFICIAL SEAL
DOROTHY J. BADIVIAN
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

My Commission Expires Feb. 25, 1969